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REPORT
99-467

AMENDING THE ANTITRUST LAWS IN ORDER TO PRESERVE AND PROMOTE WHOLESALE AND RETAIL COMPETITION IN THE RETAIL GASOLINE MARKET AND TO PROTECT THE MOTORING SAFETY OF THE AMERICAN PUBLIC

SEPTEMBER 23 (legislative day, SEPTEMBER 15), 1986.—Ordered to be printed

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Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany S. 1140]

The Committee on the Judiciary, to which was referred the bill (S. 1140) to amend the antitrust laws in order to preserve and promote wholesale and retail competition in the retail gasoline market and to protect the motoring safety of the American public, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

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I. PURPOSE

The majority of the Committee recognizes that in recent years there have been a number of significant developments at various levels in the petroleum industry. Amid these developments, certain

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events are threatening the role of the independent, branded service station dealer in the retail gasoline sales market. The number of small and independent operators of motor fuel service stations has declined dramatically in recent years. Likewise, the share of all retail gasoline sales accounted for by the independent franchised dealers had been eroded. This legislation is intended to preserve and enhance the competitive role of the small businessmen and businesswomen who operate branded gasoline stations as the franchisees of major petroleum refiners.

The decline in the presence of these competitive small businesses in the retail gasoline market may be the result of many factors, but it is the intention of the Committee in passing this legislation to ensure that the franchised dealers are not forced out of the market by any unfair pricing practices of their suppliers. Gasoline station dealers have left the market in dramatic numbers recently. Between 1972 and 1979 approximately 80,000 dealers went out of business. Some of these dealers attribute their difficulties to the marketing strategies of the integrated oil refiners which franchised and supplied them. Specifically, dealers have contended persuasively that some major refining companies have been moving in the retail level of marketing through direct operation—rather than franchise operation—in which they can set and control the retail price as well as the wholesale supply prices. Through direct operation, the refiners engage in direct competition with their preestablished independent dealers. These refiners' direct operations are increasingly the high-volume, self-serve, "super-pumper" stations with low unit costs. At the same time, jobbers and other wholesalers have been entering the retail market in larger numbers, frequently with nonbranded super-pumper operations with low unit costs.

In these direct operations, the refiners sell gasoline in competition with their dealer-operated stations in the same marketing area. The refiners set both the wholesale price charged the independent franchisees in that area and the retail prices on that same brand of gasoline at the service stations that they operate themselves. The dealers allege that this competition is, in some cases, at retail prices below the wholesale prices charged the dealers. While the gasoline consumer may derive temporary benefit from the refiner-operation's lower prices, the long-range effect is inevitably to drive the franchise dealers' margins lower and lower, forcing the dealers first to stop providing valuable services to consumers and eventually to leave the market altogether. The Committee believes that any benefit from this temporary unfair competition is outweighed by the economic and social harm resulting from the withdrawal of increasing numbers of small, independent retail competitors from the market and from the consequent decline in maintenance, repair, and other services valuable to automobile owners.

The Committee recognizes that there are economic forces acting upon the dealers in addition to the reported pricing pressure from refiner-operated retailing. Dealers have to contend with rapidly rising rents, credit card handling fees, supplier-extended hours of operation and other factors. While refiners have sold less gasoline to dealers, they have sold more to jobbers and through their own operations. Between 1972 and 1981 it is reported that the sales

volume of refiner-operated outlets increased 86 percent while the number of such outlets increased 14 percent; in the same period, dealers' sales volume dropped 36 percent.

This bill seeks to preserve the place of the competitive, independent dealer in the changing market for retail gasoline sales. It is intended to promote the viability of small independent businesses engaged in retail gasoline marketing by limiting, or capping, the number of retail outlets operated by the major refiners which are also supplying these dealers. The bill also seeks to preserve competition by increasing or assuring the ability of the dealers to obtain gasoline supplies on competitive terms from suppliers other than their franchisors. This latter goal is accomplished by making it unlawful for any refiners to require that their franchisees purchase more than 70 percent of their gasoline requirements from those refiners; the effect of this provision is to leave a dealer free to negotiate for the purchase of gasoline supplies at prices more favorable than those offered by its franchisor. The Committee believes that the approach taken in this legislation is the most direct and effective way of assuring the continued competitive viability of small independent retailers of gasoline.

Effective on the date of enactment of this bill, approximately 14 major integrated refiners would be prohibited from directly operating any retail motor fuel service station, except that those refiners could continue to operate any motor fuel service station which they were operating on the date of enactment. There would be no restriction on the continued ownership of gasoline stations by these refiners; the stations could be owned by refiners but leased to dealers or otherwise operated by independent marketers.

Refiners with total refining capacity of less than 175,000 barrels per day, and refiners which produce less than 30 percent of their own crude oil requirements, would not be covered by the restriction on the number of directly operated outlets. While some of these small refiners are large enough to have their own distribution networks, and some are quite large operators in some regions, none of them operate on a national basis. Frequently, they are also suppliers to unbranded and independent dealers. Both the independent refiners and the dealers they supply are generally aggressive competitors in the retail market. Nothing in this legislation is intended to inhibit healthy competition from those companies.

Effective one year after enactment, it would also be unlawful for any major integrated refiner to require that its franchised dealers buy more than 70 percent of their monthly sales of motor fuel from that refiner. It would also be unlawful for such a refiner to prohibit its franchised dealers from converting storage tanks and pumps to be used to sell gasoline purchased from another supplier. The bill provides safeguards against dealer deception of consumers about the source and identity of the motor fuel being sold, and safeguards against dealer derogation of the refiner's trademark. Dealers operating stations bearing a refiner's trade name must provide point-of-sale notice to consumers if the product being sold was not obtained from the trade name owner.

The bill would give a franchised dealer the flexibility to negotiate with its franchisor and with other suppliers with respect to 30 percent of the dealer's fuel requirements. The purpose of this provi-

sion is to enhance competition at the wholesale level and to permit dealers to secure cost savings on their gasoline requirements, which they may pass on to consumers in the form of lower prices or valuable services.

The open-supply sections of the bill would codify the essential terms of the settlements in *Bogosian* v. *Gulf Oil.* The bill would allow independent dealers to purchase up to 30 percent of their monthly requirements of motor fuel from a source other than the producer or refiner under whose trademark the dealers operate. This provision would allow a dealer to sell another brand of fuel through existing pumps and tanks, provided that reasonable notice was provided to the ultimate consumer at the point of sale.

The open-supply provision of S. 1140 will ease the plight of the lessee dealer by allowing the dealer to purchase and offer for sale motor fuel purchased from sources other than this refiner-supplier, if he can obtain the supplies at more favorable prices. It will give the dealer some bargaining power with his refiner-supplier.

The bill would give the Federal Trade Commission responsibility for enforcing the restrictions; in addition, the bill would authorize private lawsuits by those parties affected by violations of the Act.

II. TEXT OF S. 1140 AS REPORTED

[S. 1140, 99th Cong., 1st sess.]

A Bill to amend the antitrust laws in order to preserve and promote wholesale and retail competition in the retail gasoline market and to protect the motoring safety of the American public.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Motor Fuel Sales Competition Improvement Act of 1985".

WHOLESALE PURCHASE OF GASOLINE

SEC. 2. (a) Notwithstanding any other provision of law and except as provided in this section, it shall be unlawful for any producer or refiner, directly, or indirectly, to require any retail motor fuel dealer to purchase more than 70 per centum of the monthly retail sales of motor fuel from such producer or refiner or to prohibit the use of conversion of storage tanks and dispensers as provided in subsection (c).

(b) It shall be a violation of this Act for any producer of refiner to contract, combine, or conspire with another producer or refiner for the purpose of violation subsection (a).

(c) It shall be unlawful for any dealer, at a motor fuel service station displaying a trademark, trade name, or other identifying symbol or name owned by a refiner or producer, to sell motor fuel which is not provided by or for such producer or refiner without providing reasonable notice at the point of sale that motor fuel dispensed by one or more dispensers is not refined by or for such producer or refiner, except that a dealer may convert one or more existing storage tanks and dispensers or establish new storage tanks and dispensers for sale of motor fuel supplied by other than the

owner of the trademark, trade name, or identifying symbol displayed at the station.

OPERATION OF MOTOR FUEL SERVICE STATIONS

SEC. 3. It shall be unlawful for any large integrated refiner to operate any motor fuel service station in the United States.

EXCEPTIONS

SEC. 4. (a) Notwithstanding section 3, it shall not be a violation of this Act for a large integrated refiner to own all or part of the assets of a motor fuel service station so long as such producer does not engage in the business of selling motor fuel at such station through any—

(1) employee;

(2) commissioned agent;

(3) person acting on behalf of the refiner or under the refiner's supervision; or

(4) person operating such station pursuant to a contract with the refiner which provides that the refiner has substantial or effective control over the motor fuel operations of the station.

(b) Notwithstanding section 3, a large integrated refiner may continue to operate any motor fuel service station which it was operating on the date of enactment of this Act.

DEFINITIONS

SEC. 5. For purposes of this Act the term—

(1) "producer" means any person who is engaged, directly or indirectly, in the production of crude oil;

(2) "refiner" means any person engaged, directly or indirectly, in the refining of motor fuel or any producer who contracts with another to refine petroleum products for purposes of sale of motor fuel by the producer;

(3) "large integrated refiner" means any person who for the most recent calendar year for which data are available—

(A) produced, directly or indirectly, more than 30 per centum of the domestic and imported crude oil supplied to its refinery; and

(B) whose total refinery capacity exceeds one hundred and seventy-five thousand barrels per day;

(4) "motor fuel" means gasoline, diesel fuel, alcohol, or any mixture of them sold for use in automobiles and related vehicles;

(5) "motor fuel service station" means any facility at which motor fuel is sold at retail;

(6) "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, joint-stock companies, trustees and receivers in bankruptcy and reorganization, common law trusts, and any organized group, whether or not incorporated;

(7) "United States" means the several States, the District of Columbia, and any territory or possession of the United States.

ENFORCEMENT AND EFFECTIVE DATE

SEC. 6. (a) The Federal Trade Commission may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever the Federal Trade Commission has reason to believe that any person has violated or is violating any provisio of this Act, or any regulations promulgated thereunder. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located, resides, or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance, to impose monetary penalties under the same terms and conditions as provided in section 5(m)(2)(A) of the Federal Trade Commission Act, and to order such additional equitable relief as it deems appropriate.

(b)(1) If any person fails to comply with the requirements of this section, any other person affected by such failure may maintain a civil action against such person failing to comply with such requirements for damages and appropriate equitable relief, including temporary and permanent injunctive relief. If the plaintiff prevails in any action under this section, the plaintiff shall be entitled to reasonable attorney and expert witness fees to be paid by the defendant, except that in any case in which the court determines that only nominal damages are to be awarded to the plaintiff, the court may, in its discretion, determine not to direct that such fees be paid by the defendant.

(2) An action brought pursuant to this section may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the plaintiff resides or is doing business or in which the defendant resides or is doing business.

(c) Section 2 of this Act shall take effect one year after the date of the enactment of this Act.

(d)(1) The Federal Trade Commission shall prescribe regulations for the collection of information necessary for the determinations specified in section 3 and for the manner of complying with the requirements of section 2(c).

(2) Notwithstanding any other provision of this Act, information related to section 3 need not be provided by private persons if reliable and timely information is available from published sources.

(3) Regulations promulgated pursuant to paragraph (1) shall be promulgated, after notice and a reasonable period for comment by the public, no later than one hundred eighty days after the date of enactment of this Act.

(4) No section of this Act shall supersede any comparable State law to the extent that compliance with the State law can be accomplished consistent with this Act.

III. NEED FOR LEGISLATION

As mentioned, the Committee believes that this legislation is needed to preserve the role of the full-service franchised gasoline dealer in our competitive motor fuel markets. These dealers are small businesses, independent and competitive, and they are unable to survive large-scale incursions into the retail tier by the same large companies which supply them with motor fuel products.

It is important to take steps to assure the continued survival of this type of independent business while also enhancing the competitiveness of these retailers. By doing so, we will preserve opportunities for small businesses to develop and flourish while assuring consumers the benefits of enhanced competition and an improved and broader range of services.

The Committee is aware of the large number of independent gasoline dealers who have gone out of business in recent years. The Committee believes that by limiting the ability of refiners to market directly, in competition with their dealers whom they supply, the relationship between the refiners and the dealers will be strengthened.

As it stands now, the dealers face many pressures in the marketplace to which they cannot adequately respond. The dealers face price pressure from their own refiner-suppliers in the retail market, yet they are not clearly free to purchase supplies of gasoline from other sources. Jobbers and other retailers competing with the branded dealers are often able to switch suppliers to take advantage of better prices at the wholesale level. S. 1140 improves the ability of franchised dealers to compete with those jobbers and other firms by permitting the dealers much greater flexibility in obtaining supplies from other sources if they are able to obtain them on more favorable terms. While some dealers have recently secured freedom to purchase some of their supplies from sources other than their franchisor, as part of the settlement of private antitrust litigation, those settlement agreements expire after a limited period of time and are not uniform. This legislation is needed to ensure the consistent and continued ability of the franchised dealers of major refiners to negotiate with other suppliers for some of their requirements, if the dealers choose to do so.

Three principal objections have been raised to this legislation: first, that existing law is adequate to protect dealers; second, that there is no evidence of subsidized pricing; and, finally, that the experience of states which have enacted divorcement laws has shown them to be anti-consumer.

A careful analysis of the evidence offered to support these allegations shows that these claims are not persuasive.

Opponents of this legislation argue that existing laws, specifically the Petroleum Marketing Practices Act, Sections 1 and 2 the Sherman Act, and the Robinson-Patman Act, adaquately protect dealers from competition from their own suppliers. The Committee's analysis reveals that a dealer seeking relief under these Acts will often have his case dismissed on a jurisdictional basis, without reaching the merits of the complaint.

The Petroleum Marketing Practices Act (PMPA) was passed in 1978 in response to criticism that the typical oil franchise relationship was unfair to the dealer-franchisee.

To date, judicial interpretations of the Petroleum Marketing Practices Act have allowed franchisors to impose any terms they choose, even where the effect may be to evict the dealer economically by a massive rent hike, credit card fee, or other means. See generally, Note, Establishing a Balance of Power: The Petroleum Market Practices Act and the Franchisor Landlord, 22 Duquesne L.Rev. 707,718 (1984) (narrow interpretations of good faith afford

franchisee little protection from risk of non-renewal); Finch, Judicial Interpretations of the Petroleum Marketing Practices Act: Strict Construction of Remedial Legislation, 37 Business Law 141, 147-155 (burdensome franchisor practices uniformly applied generally not susceptible to challenge). Until this trend is reversed, it cannot be said that PMPA provides meaningful protection for franchisees.

Likewise, the Robinson-Patman Act affords inadequate protection to dealers when their suppliers present them with unfavorable wholesale prices vis-a-vis their competitors. The reason that a dealer will not be able to establish a Robinson-Patman claim is because the transfer of gasoline from the refiner to its wholly owned subsidiary—which competes with the dealer—is an *intracorporate transfer,* not a sale. The Robinson-Patman Act is violated only where two sales in interstate commerce are made to different purchasers of goods of like grade and quality at discriminatory prices. As stated in *Security Tire & Rubber Co.* v. *Gates Rubber Co.,* 598 F.2d 962, 966 (5th Cir. 1979):

> Transfers from a parent corporation to its wholly-owned subsidiary corporation are transfers within the same economic unit. These transfers are the economic equivalent of intra-company transfers of goods. As such, these transfers cannot be considered sales for Robinson-Patman purposes.

Robinson-Patman price-discrimination suits by dealers and jobbers have been dismissed on this jurisdictional basis and the merits of the claim are not reached. In short, the Robinson-Patman Act is simply not available to address problems with dual distribution (i.e., a supplier competing with his customer for retail sales).

Even if the dual distribution loophole could be closed, a second jurisdictional hurdle would be faced by a dealer—the requirement that one of the sales be made "in interstate commerce." Under the Sherman Act and other federal statutes, the jurisdictional requirement is that the transaction be in *or affect* interstate commerce. Under the Robinson-Patman Act, however, the Supreme Court held, in *Gulf Oil Corp.* v. *Kopp Paving Co.,* 419 U.S. 186, 95 S.Ct. 392, that at least one of the sales be *in* interstate commerce or across state lines. Courts have held that a refiner's sales to stations located within the refiner's state are not "in commerce" as required by Section 2(a) of the Robinson-Patman Act. See *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231 at 240 (1951); *Borden Co.* v. *Federal Trade Commission,* 339 F. 2d 953 (7th Cir. 1964). The result is that the Robinson-Patman Act provides no effective relief for the competitive problems of dealers who compete with their own suppliers.

In addition, the claim that there is no evidence of predatory pricing by refiners in their company-operated locations has its genesis in a study released by the Department of Energy in 1981, pursuant to Title III of the Petroleum Marketing Practices Act. While the study has often been characterized as showing that predatory pricing does not exist in the gasoline marketing industry, at most it only shows that pricing below average variable cost—one standard measure of predatory pricing—was not found in certain markets during the era of price and allocation controls. Nevertheless, nu-

merous instances of company-operated stations selling to the public at retail prices below a dealer's wholesale price have been reported to this Committee and other committees which have investigated the issue.

Several states, including Maryland, Connecticut, Delaware, Florida, and Virginia, and the District of Columbia, have enacted divorcement laws or other laws placing substantial restrictions on refiner company-operations. Studies by the opponents of this bill have attacked these laws as anticompetitive and anticonsumer. The best known of these, and the most frequently cited, is the Arco-Barron-Umbeck study of the Maryland experience. The Committee has reviewed these materials and has concluded that divorcement laws have benefitted consumers by producing a more stable retail environment. Empirical evidence of the Maryland market after both decontrol and full implementation of divorcement shows that consumer prices have not risen, and in fact that dealers are able to provide gasoline at lower prices and *mark-ups* due to their ability to invest in ancillary business such as service bays or convenience stores without fear that a successful business could be taken over for company-operation.

A critical allegation made by the Arco-Barron-Umbeck report is that Maryland dealers were able to hike their profit margins on gasoline due to divorcement. (The dealer margin is the only factor that the dealer controls. Retail prices may be higher in one area than another because of higher wholesale prices paid by dealers.) An analysis of dealer margins in Maryland after full implementation of divorcement and decontrol of gasoline prices and allocations reveals the following:

(a) Immediately after divorcement and decontrol (January, 1982), Maryland dealers had the *lowest margins* in the country on self-serve gasoline. Maryland dealers believe this is due to having intense price competition between large numbers of independent dealers and to their ability to invest in ancillary profit centers without the fear that a successful business could be taken over and converted to a company operation.

(b) Over the period from 1982 to 1984, Maryland dealers had the second lowest mark-up on self-serve gasoline in the nation. This is not consistent with the Arco-Barron-Umbeck predictions.

In summary, the Committee was persuaded that there is a need for this legislation in order to preserve the role of the independent branded service station dealer, and rejected arguments to the contrary.

IV. COMMITTEE ACTION

The Committee conducted a day of hearings on S. 1140: October 9, 1985. S. 1140 was reported out of the Committee as amended on August 7, 1986, by a roll call vote, as follows:

YEAS (10)	NAYS (6)
Thurmond	Laxalt
Mathias	Hatch
Grassley	Simpson
Kennedy	Denton
Byrd	Specter

Metzenbaum	McConnell
DeConcini	
Leahy	
Heflin	
Simon	

Prior to final passage, Senator Simon offered, and Senator Metzenbaum accepted, the following amendment to S. 1140:

On page 2, line 25, after "4." insert "(a)".

On page 3, between lines 11 and 12, insert the following:

> (b) Notwithstanding section 3, a large integrated refiner may continue to operate any motor fuel service station which it was operating on the date of enactment of this Act.

This Simon amendment was then passed by a voice vote.

Senator Simon then offered the following amendment to S. 1140:

Beginning on page 1, line 6, strike out through line 19, page 2 and insert in lieu thereof the following:

> SEC. 2. (a) It shall be unlawful for any dealer, at a motor fuel service station displaying a trademark, trade name, or other identifying symbol or name owned by a refiner or producer, to sell motor fuel which is not provided by or for such producer or refiner.
>
> (b) It shall be unlawful for any producer or refiner, directly or indirectly, to prevent any dealer at a motor fuel service station displaying a trademark, trade name, or other identifying symbol owned by a refiner or producer from purchasing motor fuel sold under such trademark, trade name, or other identifying symbol from a source other than such producer or refiner.
>
> (c) It shall be a violation of this Act for any producer or refiner to contract, combine, or conspire with any other producer or refiner for the purpose of violating subsection(b).

On page 6, line 14, strike out "section 2(c)" and insert in lieu therof "subsections (a) and (b) of section 2".

This Simon amendment to S. 1140 was defeated by a roll call vote, as follows:

YEAS (7)	NAYS (8)
Laxalt	Thurmond
Hatch	Mathias
Simpson	Grassley
Denton	Kennedy
Specter	Byrd
McConnell	Metzenbaum
Simon	DeConcini
	Leahy

Senator Thurmond then offered, and Senator Metzenbaum accepted, a technical amendment to S. 1140, as follows:

In line 24, page 5, change "Sections" to "Section", and delete "and 3".

This Thurmond amendment to S. 1140 was then adopted by unanimous consent.

Senator Metzenbaum then offered an amendment to S. 1140, as follows:

Add a new subsection (d)(4) after line 12, page 6:

> (4) No section of this Act shall supercede any comparable state law to the extent that compliance with the state law can be accomplished consistent with this Act.

This Metzenbaum amendment to S. 1140 was then passed by voice vote.

The bill, S. 1140, was then passed as amended by roll call vote, 10–6, as noted.

V. SECTION-BY-SECTION ANALYSIS

The first section provides that this Act may be cited as the "Motor Fuel Sales Competition Improvement Act of 1985."

Section 2(a) prohibits any producer or refiner of any size from requiring any service station dealer to purchase more than 70 percent of its requirements of motor fuel from that refiner. Section 2(a) also prohibits any producer or refiner from prohibiting any service station dealer from converting existing storage tanks and pumps at a service station to use in the sale of motor fuel purchase from another refiner. Section 2(c) sets forth conditions under which service station dealers are permitted to convert tanks and pumps to use in the sale of products supplied by another refiner. Section 2(b) prohibits any producer or refiner from combining, conspiring or contracting in any with any other producer or refiner to violate the prohibitions contained in Section 2(a).

Section 2(c) provides that a service station dealer may convert one or more existing storage tanks and pumps for the purpose of selling motor fuel supplied by a refiner other than its franchisor. Section 2(c) provides protection for the trademark or trade name of a dealer's franchisor and for consumers by requiring reasonable notice when a dealer sells motor fuel supplied by a refiner other than the owner of the trademark displayed at the service station. Section 2(c) prohibits a dealer from selling, at a service station displaying a trademark, trade name or other identifying symbol owned by a refiner, any motor fuel which is not provided by such refiner without providing reasonable notice at the point of sale to consumers. The requirement of reasonable notice is intended to be consistent with, and in no way to contravene, the requirements of the Lanham Act governing trademarks (15 U.S.C. §§ 1053 *et seq.*).

Section 3 prohibits refiners, other than small and independent refiners, from operating retail service stations; however, an exception permits refiners to continue operating those stations they are operating on the date of enactment. Section 3 makes it unlawful for "a large integrated refiner" to operate directly or indirectly any motor fuel service station in the United States. A "large integrated refiner" is defined as any person who, for the most recent calendar year for which data are available, produced more than 30 percent of the oil supplied to its refinery and whose total refinery capacity exceeds 175,000 barrels per day. Section 4(b) makes an exception to

this prohibition and permits a large integrated refiner to continue to operate any service station which it was operating on the date of enactment of this Act. Thus, the effect of Sections 3 and 4(b) is to restrict large integrated refiners to operating only the service stations they are operating on the date the Act is enacted, and to prohibit those refiners from enlarging the number of service stations they operate after that date. The bill as reported does not require divestiture of any assets by a large integrated refiner; rather, the entent and effect of the reported bill is to prohibit large integrated refiners from expanding their numbers of directly operated retail outlets.

Section 4(a) clarifies that it is not unlawful for a large integrated refiner to own a service station; rather, the prohibition contained in Section 3 is on the operation of retail service stations. Sections 4(a) indicates that such a refiner may own all or part of the assets of a motor fuel service station so long as such refiner does not sell motor fuel at the station through any employee, commissioned agent, person acting on behalf of the refiner, or person operating the station under a contract with the refiner which gives the refiner substantial or effective control over the motor fuel operations of the station. Quite clearly, this means that a refiner may own a service station but it cannot directly or indirectly operate the station, subject to the exception in Section 4(b).

Section 4(b) is the result of an amendment by the full Committee. Section 4(b) provides that it shall not be unlawful for a major integrated refiner to continue to operate any motor fuel service station which it was operating on the date the bill is enacted.

Section 5 defines the terms used in the bill. Section 5 defines:

"Producer" as any person who is engaged, directly or indirectly, in the production of crude oil;

"Refiner" as any person engaged, directly or indirectly, in the refining of motor fuel or any producer who contracts with another to refine petroleum products for purposes of sale of motor fuel by the producer;

"Large integrated refiner" as any person who, for the most recent calendar year for which data are available, produced directly or indirectly more than 30 per cent of the crude oil supplied to its refinery and whose total refinery capacity exceeds one hundred seventy-five thousand barrels per day;

"Motor fuel" as gasoline, diesel fuel, alcohol, or any mixture of them sold for use in automobiles and related vehicles;

"Motor fuel service station" as any facility at which motor fuel is sold at retail;

"Person" as one or more individuals, partnerships, associations, corporations, legal representatives, joint-stock companies, trustees and receivers in bankruptcy and reorganization, common law trusts, and any organized group whether or not incorporated;

"United States" as the several States, the District of Columbia, and any territory or possession of the United States.

Section 6 provides for the enforcement and effective date of the Act.

Section 6(a) provides for enforcement by the Federal Trade Commission and Section 6(b) provides for a private civil action by parties who are affected by violations of the Act.

Section 6(a) authorizes the Federal Trade Commission to bring a civil action for appropriate relief, including a permanent or temporary injunction, whenever the Commission has reason to believe this Act or regulations promulgated thereunder have been violated.

Section 6(b)(1) provides that any person affected by another person's failure to comply with any provision of this Act may bring a civil action against that other person for damages and appropriate equitable relief, including temporary and permanent injunctive relief. Section 6(b)(1) also provides for the award of attorney fees and expert witness fees to the prevailing plaintiff in such a civil action. An exception is made for cases in which the court awards only nominal damages to the plaintiff; in such cases, the court may, in its discretion, determine not to direct that attorney and expert witness fees be paid by the defendant.

Section 6(b)(2) provides that any action brought under this Act may be filed, without regard to the amount in controversy, in the United States district court in any judicial district in which the defendant resides or is doing business.

Section 6(c) provides that Section 2 of the Act shall take effect one year after the date of enactment, to allow time for the promulgation by the Federal Trade Commission of the regulations provided for in Section 6(d)(1).

Section 6(d)(1) provides that the Federal Trade Commission shall prescribe regulations for the collection of information necessary for the enforcement of Section 3 and regulations for the manner of complying with the requirements of Section 2(c). Section 6(d)(2) provides that information related to Section 3 need not be provided by private persons if reliable and timely information is available from published sources.

Section 6(d)(3) provides that the Federal Trade Commission shall promulgate the regulations provided in Section 6(d)(1) after notice and a reasonable period for comment by the public but no later than one hundred eighty days after the enactment of this Act.

Section 6(d)(4) provides that no section of this Act shall supersede any comparable State law to the extent that compliance with the State law can be accomplished in a manner consistent with this Act.

VI. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact which would be incurred in carrying out the bill:

The Committee estimate of the regulatory impact of S. 1140 is based on two provisions of the bill: One is a restriction on expansion by large integrated refiners of the number of retail outlets they operate, and the other is a provision allowing branded franchisee dealers to purchase up to 30 per cent of their motor fuel supplies from sources other than the refiner-owner of the trademark under which they operate (the "open-supply" provision). In connection with the first of these provisions, the Federal Trade Commission is the Act. In connection with the second of these provisions, the Federal Trade Commission is directed to promulgate regulations providing for dealers who take advantage of the open-

supply option (i.e., to obtain motor fuel from sources other than the owner of the trademark under which they operate) to notify consumers of the identity of the motor fuel product being sold (the "disclosure regulations").

The Committee estimates, based on information obtained from knowledgeable source, that the limitation on large-refiner operation of service stations will affect approximately fourteen petroleum refining companies which own and operate approximately 7,000 stations. The prohibition on petroleum producers and refiners of any size requiring dealers to purchase more than 70 percent of dealer supplies of motor fuel from those producers or refiners would affect approximately 130 producers and refiners. The point-of-sale disclosure regulations would apply to all branded franchised dealers which might take advantage of the option to obtain some of their motor fuel supplies from sources other than their franchisors. While it is not possible to ascertain the number of such dealers which might sell products requiring disclosure notices and other related record-keeping, the Committee is informed that the maximum number of affected service stations is approximately 130,000.

The groups and classes of individuals and businesses that would be subject to regulation under this Act are petroleum producers and refiners and branded franchised service station dealers.

The economic impact of such regulation on the individuals, consumers and businesses affected will depend on the extent to which the Act is successful in preserving and enhancing long-run competition and consumer service options in the retail gasoline market. The Committee intends and expects that the bill should have no adverse economic effect and that the bill will produce overall favorable effects for service station dealers and consumers. The large refiners whose operation of retail outlets will be restricted may be required to reassess current marketing strategies, which may impose significant business costs on those firms. In addition, the bill may require significant efforts by producers and refiners to monitor the percentages of supplies sold to retailers under open-supply arrangements. Even so, the bill is not expected to have a significant negative impact on the business health of any firm. Offsetting this, by preserving the role and numbers of independent competitors in the retail gasoline industry, the Act is expected to yield positive economic effects for independent service station dealers and consumers. It is also expected that the Act, by preserving the important role of the branded dealer, will yield improved relationships between refiners and their franchised dealers.

The Act is expected to have no effect on the personal privacy of individuals affected.

The amount of paperwork, and the time and financial costs, required of affected parties is difficult to estimate, since the Act provides that the Federal Trade Commission shall determine the manner of complying with the disclosure requirements of the Act and shall promulgate the necessary regulations. However, the Committee does not expect that the record-keeping efforts and compliance costs required of affected parties will be substantial or will add significantly to the record-keeping and reporting currently required of such parties by other programs. The Committee anticipates that the Federal Trade Commission will promulgate uniform

regulations requiring dealers to post some form of clearly visible notice at the point of sale. Dealers will likely be required to make a one-time investment in the signs or materials necessary to comply with the notice requirements. It is also likely that dealers will be required to keep additional records of the identities and sources of motor fuels sold at various times, records of the times of posting consumer notices, records relating to refiner's credit card transactions, and records relating to the percentage of total product sales accounted for by unbranded products. Refiners may also keep similar records on credit card sales and the percentages of sales of unbranded products in order to monitor agreements with dealers. Dealers must now maintain various inventory records in connection with other federal, state and local environmental regulations. The Committee anticipates that refiners and dealers will be responsible for some additional paperwork and record-keeping in order to comply with this Act, but the Committee cannot estimate with any certainty the magnitude of these additional burdens.

VII. ESTIMATED COST OF LEGISLATION

In accordance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and Section 403 of the Congressional budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 22, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1140, the Motor Fuel Sales Competition Improvement Act of 1985, as ordered reported by the Senate Committee on the Judiciary on August 7, 1986. We estimate that enactment of this legislation would cost the federal government approximately $1 million in fiscal year 1987, increasing to $1.5 million by 1991.

S. 1140 prohibits major integrated refiners from directly operating any motor fuel service station effective one year from date of enactment; stations already operated by major refiners would be exempt from this legislation, however. It outlines requirements regarding the purchasing and selling of motor fuel by dealers and specifies various regulatory enforcement procedures. In addition, S. 1140 requires refiners to submit production and refinery data to the Federal Trade Commission (FTC) if this information is not available from published sources.

Based on information from the FTC, which would have the responsibility for developing and enforcing the regulations necessary to implement the legislation, we estimate that approximately 15 professional staff-years plus 5 clerical years would be required annually for this purpose. This estimate is based on the staffing requirements for similar activities at the FTC and the Department of Energy, and reflects a minimal level of effort, according to the FTC.

Although no authorization of appropriations is provided in the bill, we estimate that the cost to the federal government resulting from enactment of S. 1140 would be approximately $1 million in fiscal year 1987, assuming enactment early in the fiscal year. The estimated annual costs would increase from $1.3 million in 1988 to $1.5 million by 1991. Additional federal court cases might also result if the FTC brought civil actions for violations, but it is impossible to predict the level of federal litigation resulting from enactment of S. 1140.

No cost would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD GRAMLICH
(For Rudolph G. Penner, Director).

VIII. VOTE OF THE COMMITTEE

On August 7, 1986, with a quorum present, by roll call vote of 10 yeas and 6 nays the Committee on the Judiciary ordered S. 1140 as amended favorably reported.

DISSENTING VIEWS OF SENATORS PAUL LAXALT, ORRIN G. HATCH, AND ALAN K. SIMPSON

INTRODUCTION

Based upon extensive review of the record, we cannot support S. 1140, The Motor Fuel Sales Competition Improvement Act of 1985. It is anticonsumer and anticompetitive legislation that would severely hurt consumers, reduce competition and ultimately harm the small, independent motor fuel marketers it purports to help. Most notably, the open supply provision of S. 1140 would threaten the integrity of the consumer's confidence in gasoline quality, while the divorcement provision would increase prices and reduce services to consumers. S. 1140 is protectionist legislation that would purportedly benefit service station dealers unable to adapt to a rapidly changing gasoline marketplace.

Specifically, S. 1140 would impose restrictions on supply contracts between producers/refiners and branded dealers (open supply), and would prohibit large, integrated refiners from directly operating any motor fuel service station in the United States (divorcement). The legislation also contains a "grandfather" provision which preserves company-operated service stations in operation at the time of enactment. This provision does not make S. 1140 acceptable legislation.

Opponents of S. 1140 are numerous. The Departments of Justice and Energy and the Federal Trade Commission have long opposed retail divorcement and open supply legislation. More recently, the American Bar Association, Section of Antitrust Law also expressed its opposition to S. 1140.

The majority of national gasoline marketing trade organizations oppose divorcement/open supply legislation. These include the Petroleum Marketers Association of America, which represents thousands of distributors, the Society of Independent Gasoline Marketers of America, which represents hundreds of independent chain marketers, and the Independent Gasoline Marketers Council.

Other organizations that oppose divorcement legislation include the National Alliance of Senior Citizens, the National Conference of Black Mayors, Consumer Alert, the Highway Users Federation and numerous state chambers of commerce and business groups.

The premise for S. 1140, alleged predatory action by large, integrated oil companies, has not been substantiated. Motorists in the United States are well served by today's competitive, free market. Independent gasoline marketers remain the dominant distributors and retailers of refined petroleum products. The number of outlets directly-operated by large, integrated oil companies remains a very small percentage of total gasoline retail outlets.

Further, S. 1140 is unnecessary. Legislation already exists to protect dealers from unfair marketing practices including federal and

state antitrust laws and the 1978 Petroleum Marketing Practices Act (PMPA). Additionally, numerous retail divorcement and open supply legislative proposals have been introduced in the states. However, only five states and the District of Columbia have adopted some form of divorcement legislation. One state, Florida, recently repealed its divorcement law.

The record shows the implications of open supply, divorcement, and in particular the "grandfather" clause, have not been adequately considered. The Department of Energy and small marketer groups opposed to such legislation have not been heard from on S. 1140. Moreover, the "grandfather" amendment adopted during markup, received no examination in hearings or in statements submitted for the record. Finally, the close vote (7–8) on an amendment to delete the open supply provision, which was introduced by Senator Simon (D-IL), clearly indicated serious concern about open supply and the need for further study on the matter.

In summary, S. 1140 would create an unwarranted intrusion of government regulation into a highly competitive gasoline market. Additionally, it would create a serious disincentive for refiners to maintain branded dealer networks. The final result would be reduced benefits to consumers, reduced competition and the possible demise of independent, branded lessee dealers. The Senate should reject S. 1140 in its entirety.

Following is a summary of the two major provisions of S. 1140, and a brief analysis on how each provision would affect consumers and the motor fuel market.

OPEN SUPPLY

Section 2 of S. 1140 would make it unlawful for any producer or refiner, directly or indirectly, to require retail motor fuel outlets to purchase more than 70 percent of the monthly retail sales of motor fuel from such producer or refiner. Section 2 also would permit dealers displaying the trademark, trade name or identifying symbol of a producer or a refiner to sell gasoline supplied by others and to convert tanks and dispensers for this purpose so long as "reasonable notice" is given at the station.

These open supply provisions represent a legislative attempt to obtain for dealers all the benefits of branded marketing without the responsibility of providing a supplier's branded products to the consumer. Open supply should be opposed because it: (1) reduces consumer protections, (2) is discriminatory, (3) weakens the branded marketing network, (4) poses environmental and liability concerns, (5) dilutes the protection of trademark laws, and (6) is unnecessary.

Reduces consumer protections

Open supply would harm consumers because the quality and availability of major brand gasoline sold by lessee dealers affiliated with major refiner brands would be reduced. Major brand refiners currently supply only gasolines meeting their quality specifications to their branded dealers and distributors. Under S. 1140, refiner incentives and abilities to maintain their high level of quality would be lessened.

Open supply also presents opportunities for product to be misrepresented to the consumer. S. 1140 requires that dealers must provide "reasonable notice" that a different brand of gasoline is being sold at a station carrying the trademark of a refiner. Millions of motorists make their purchase decision before they enter a retail gasoline station on the basis of company reputation for dependability and product integrity. Motorists attracted by the prominent brand logo or sign, could be mislead by a small notice found only after entering a station that the brand they seek is not available at that station. The motorist may even cease purchasing the brand, harming all dealers marketing that brand and the refiner.

At present, consumers can rely on refiners to monitor the quality of motor fuel sold at service stations bearing their trademark. Under the proposed legislation, consumers would have no assurance as to the source of product purchased. Furthermore, in the event consumers purchase bad product, it may be difficult to trace liability and obtain proper compensation. It also increases a branded refiner's risk of liability.

Is discriminatory

S. 1140 is discriminatory for several reasons. First, it inhibits contractural supply arrangement for some suppliers but not for others. Under S. 1140, all producers/refiners would be subject to the open supply provision. On the other hand, the divorcement provision would apply only to select large, integrated refiners. Since the open supply provision would increase the incentive for refiner/suppliers to market through directly-operated retail outlets, producers/refiners not subject to divorcement would have a competitive advantage over refiners subject to divorcement and unable to market through directly-operated outlets.

Secondly, open supply applies to only one industry—the petroleum industry, and bestows economic advantage on one class of marketers—service station dealers. This may establish a precedent for discriminatory supplier/dealer relationships in other U.S. industries.

Weakens the branded marketing network

The balance of advantages and disadvantages of contract sales would be fundamentally changed with open supply legislation. The reduced economic benefits and increased burdens would lessen the attractiveness of branded marketing and could force branded suppliers to seek other methods of recovery of additional "costs" of branded marketing. A supplier might accept the risks and benefits of spot market sales in lieu of the burdens of contract sales.

The supply agreement between a dealer and supplier is part of a mutually beneficial arrangement. In return for the dealer's commitment to purchase motor fuels from the branded supplier, the branded supplier is obligated to have available supplies of motor fuel sufficient to meet the dealer's requirements. This arrangement assures the dealer of a reasonably secure supply of motor fuels, and it provides the supplier a dependable outlet for its motor fuel. This enables many refiners to enter into crude supply commitments and refinery investments necessary to assure a continuing supply of motor fuels to their consumers.

The Department of Justice notes that the Supreme Court found, where the market structure of an industry is characterized by numerous buyers and sellers, such (contractual distribution) arrangements often promote competition by ensuring stable markets and mutually advantageous business relationships. The gasoline industry currently is characterized by relative ease of entry into wholesaling and relatively low levels of concentration in both refining and retailing markets. Accordingly, this bill's (S. 1140) prohibitions of certain types of contractual distribution arrangements would have anticompetitive effects.[1]

According to the Department of Energy, "open supply . . . may lead to the demise of the branded dealer network (because) the mutual benefits derived from the supplier-dealer relationship may be abrogated * * *. It may become less profitable for the refiner to put the dealer into the location on the same terms as in the past * * * More up-front capital may be required from the dealer, deterring the ability of the small businessman or businesswoman to enter the business in the first place." [2]

Oil companies invest in branded service stations because they provide a reliable outlet for refined petroleum products. Under S. 1140, the sale of branded product through branded dealers is jeopardized. For example, some types or grades of motor fuel of a refiner might not be sold at all branded service stations. This fails to recognize a refiner's need for a return on investment for building and upgrading facilities or developing, introducing and marketing distinctive products. S. 1140, therefore, allows other suppliers to increase their market share investment-free.[3]

In addition, branded supply brings dealers benefits such as credit cards, training programs, advertising and many other services. Many dealers do not want to jeopardize these benefits and so oppose open supply.[4]

Poses environmental and liability concerns

S. 1140 provides inadequate protection against the potential for mislabeling, commingling and environmental damage. Consumers today are very concerned about the quality of gasoline they purchase. Many product quality issues have a direct impact on consumers; for example, the quality of premium unleaded gasolines for fuel injector cars, alcohol blends to enhance octane ratings, and lead phasedown in gasoline. If S. 1140 were enacted, a major refiner would be most concerned about possible substitution for, or contamination of, its products by others over whom it has no control.

Open supply could also hamper enforcement of federal lead phasedown gasoline regulations by the Environmental Protection

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[1] Statement of Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, before the Committee on the Judiciary on S. 1140, U.S. Senate, October 9, 1985, pg. 14.

[2] Statement of Leonard L. Coburn, Director, Division of Competition, Office of Communications, Office of Congressional, Intergovernmental and Public Affairs, U.S. Department of Energy on H.R. 3824, April 17 1986, before the Committee on Senate Small Business, Subcommittee on General Oversight and the Economy, U.S. House of Representatives, pg. 8.

[3] Letter submitted for the record on S. 1140 to the Honorable Strom Thurmond, Chairman, Senate Committee on the Judiciary May 22, 1986 from Sam Van Sickle, Senior Vice President-Marketing, Amoco Oil Company.

[4] Testimony of Marion M. Smith, Vice President—Marketing, Chevron U.S.A., before the Senate Judiciary Committee on S. 1140, October 9, 1985.

Agency and octane posting and certification regulations by the Federal Trade Commission. S. 1140 could necessitate the testing of gasoline products by government officals throughout the distribution network.

The development of federal and state underground storage tank performance standards and corrective action regulations also create special concerns for refiner-suppliers. Under S. 1140, refiners could not prohibit dealers from utilizing the refiner's underground storage tanks for selling a different brand of product. Open supply would make compliance with regulations governing product quality, inventory control, storage, monitoring and other performance standards for underground tanks much more difficult. It could make a refiner, if owner of a tank, liable for environmental damage caused by product supplied by another brand but sold through the refiner's tanks. Refiners are, therefore, especially motivated to ensure the integrity of their product to reduce the risk of product and environmental impairment liability.

Enactment of S. 1140 could also hamper federal and state government attempts to audit and seek compliance with motor fuel tax law. There have been many reports from certain states and the federal government which document that unscrupulous retailers and wholesalers have been evading the payment of petroleum taxes. Congress had a hearing on this matter in July which documented that evasion was taking place and legislation has been offered seeking to change the way the federal excise tax is collected for gasoline.

New York and California recently enacted new laws designed to cope with this growing problem. Much of the problem relates to certain retailers purchasing product from sources other than their branded suppliers. With petroleum tax evasion a major problem estimated to cost government millions of dollars in lost tax revenues, enactment of open supply could hamper state and federal efforts to audit and seek compliance with the tax laws.

Dilutes the protection of trademark law

S. 1140 would have an adverse effect both upon trademark owners, whose rights could be abrogated, and upon the consuming public, who would never be assured of the quality of the product sold under a particular trademark.

Under trademark law, a trademark owner has the right to preclude commingling of his branded product with that of others so as to assure the quality of the product. This protects consumers because they can rely on the trademark as an assurance on quality and indication of the source of the product. Under open supply, there can be no assurance of quality since there is no prohibition against commingling of branded and non-branded gasolines. Thus, open supply presents the opportunity for a violation of trademark law and the rights of the trademark owner. Although S. 1140 requires that "reasonable notice" be given at the point of sale, the fact remains that a commingled product could be sold under a particular trademark since the retailer is not required to maintain separate containers and dispensers for branded and non-branded gasolines. The trademark owner's proprietary right to a trademark and the consumer's right to an assurance on the quality of the

product sold under that trademark are harmed inspite of the "reasonable notice."

The open supply provision of S. 1140 contains no statements on the relationship of the bill to other provisions of federal law. For example, the bill does not address whether refiners' rights and obligations to enforce trademark violations under the Lanham Act are impaired.

Is unnecessary

The open supply provision of S. 1140 is unnecessary and unduly interferes with beneficial business arrangements, according to the American Bar Association.[5] Small refiners who stay competitive through the use of contractual distribution arrangments will be injured most is this Act is passed. Antitrust laws already prohibit unreasonable restrictions on a company's ability to purchase necessary supplies.

Section 3 of the Clayton Act governs the legality of exclusive dealing and requirements contracts. Section 3 prohibits the sale of a product on the condition that the consumer not deal with the supplier's competitors where a substantial lessening of competition is likely to occur by reason of foreclosing access to other sellers. The Clayton Act thus provides necessary protection without unduly limiting the flexibility of refiners to choose efficient marketing arrangements. In contrast, S. 1140 would prohibit such arrangments regardless of their effects on competition.

Additionally, S. 1140 should not be used to redress perceived contractual imbalances between refiners or producers and their lessee-dealers since Congress has already addressed this concern through passage of the Petroleum Marketing Practices Act (PMPA).

Finally, thousands of dealers own their own property or lease it from a non-refiner. They can market any gasoline they choose, and almost universally elect to go with one brand because they know consumers are not responsive to mixed brand marketers.

DIVORCEMENT

Section 3 of S. 1140 would prohibit large, integrated petroleum refiners from directly operating motor fuel service stations in the United States. It is projected that at least fourteen major refiners would be affected by Section 3.[6]

Divorcement legislation, allege proponents, would benefit consumers through lower prices and increased competition. The legislation should be opposed because in actuality: (1) it would increase prices and reduce services to consumers, (2) is based on unsubstantiated claims of predation, (3) it is unnecessary, (4) it would reduce competition and promote inefficiency, and (5) it would increase government regulation.

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[5] American Bar Association, Section of Antitrust Law, Report to the House of Delegates, recommendation to oppose S. 1140, 1986.

[6] Amerada Hess, Amoco, Atlantic Richfield, Chevron, Conoco, Exxon, Marathon, Mobil, Phillips, Shell, Sohio, Sun, Texaco and Unocal. (Statement for the Record submitted to the Senate Judiciary Committee on S. 1140 by the American Petroleum Institute, October 9, 1985, pg. 4.)

Increases prices and reduces services to consumers

Dealer proponents of S. 1140 contend divorcement has produced lower gasoline prices for consumers. Government research and academic studies, however, have shown that divorcement legislation leads to higher consumer prices and reduced hours of service. Three federal agencies have testified in Congress that divorcement legislation is anticompetitive and harms consumers. The Bureau of Competition of the Federal Trade Commission found, "there is no credible evidence of anticompetitive conduct by refiners and producers to support S. 1140." The Division of Competition of the Department of Energy concluded that divorcement raises prices and harms consumers without any long-term benefits to dealers. The Antitrust Division of the Department of Justice stated, "the elimination of one class of competitors, as well as the loss of any efficiencies gained through integrations, will tend to increase gasoline prices to consumers."

Academic studies also show that divorcement hurts retail consumers by raising prices of gasoline and reducing the hours of operation at service stations. A study on the impact of divorcement in Maryland, conducted by Professors John M. Barron and John R. Umbeck of Purdue University,[7] found that "full serve prices at stations affected by divorcement * * * rose 6.7 cents after a divorcement-induced change to a franchise operation * * * while self-service prices rose 1.4 cents." The Purdue University study also found that the hours of service at stations fell by 9.2 hours per week after divorcement.[8]

When these per gallon increases are multiplied by the billions of gallons of gasoline consumed annually, divorcement on the national level would cause American consumers to pay hundreds of millions of additional dollars each year for gasoline.

A second study on Maryland divorcement conducted by Dr. Philip E. Sorensen, Professor of Economics, Florida State University concluded, "Retail prices had risen by 1.87 cents per gallon *more* in Maryland than in the U.S. generally in the post-divorcement period." [9] Dr. Sorensen further states, "economic theory suggests that elimination of a whole class of competitors from a retail market, as in the case of refiner divorcement in Maryland will tend to increase the level of prices in the market." [10]

Is based on unsubstantiated claims of predation

The proponents of divorcement legislation allege company operations sell at retail, often below the wholesale price at which product is sold to franchisee dealers of the same brand. However, to date dealers have not produced any empirical evidence to support a

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[7] *Journal of Law and Economics,* "The Effects of Different Contractual Arrangements: The Case of Retail Gasoline Markets", Professors John M. Barron and John R. Umbeck, Purdue University, Vol. XXVII, Oct. 1984, pgs. 323–324. (Referenced in statements and testimony submitted to the Senate Committee on the Judiciary on S. 1140, October 9, 1985.)

[8] Ibid., pg. 324.

[9] *The Economic Impact of Gasoline Retail Divorcement,* A Research Report prepared by Dr. Philip E. Sorensen, Professor of Economics, Florida State University, January 1985, pg. 3. (Referenced in statement submitted for the record to the Senate Committee on the Judiciary on S. 1140, October 9, 1985.)

[10] Ibid.

change in the basic principle of free market policy and antitrust law: that consumer benefits are maximized by the protection of competition, not the protection of competitors. By contrast, all three federal government agencies charged with monitoring retail gasoline competition have found no evidence of predatory subsidization in the retail petroleum industry.

The Federal Trade Commission, in testimony before the Senate Judiciary Committee, concluded "wholesale and retail gasoline markets were unconcentrated at the national level and, in general, only moderately concentrated in particular geographic regions. Given the continued importance of the branded, franchised marketing distribution system to major refiners, traditional antitrust and economic theory indicate it would be irrational for an individual refiner to charge its franchisee-dealers prices that would cause them to either secure new sources of supply or go out of business. The likely results of such irrational behavior in the current era of reduced gasoline demand and plentiful supplies would be that the refiner would face a decrease in market share, an increase in excess capacity, and higher per unit costs. Thus, individual gasoline franchisors are not likely to engage in predation against the mainstay of their own retail distribution system, their franchised dealers." [11]

According to Justice Department testimony also presented to the Senate Judiciary Committee, "some industry observers have contended that a competitive defect exists at the wholesale and retail levels of the petroleum industry which, unless remedied, may result in the elimination of jobbers and independent service station dealers as a class. . . . If the trend could be attributed to a competitive defect in the wholesale and retail gasoline market that threatens to increase consumer prices or eliminate efficient jobbers or dealers, some sort of governmental intrusion into the marketplace might be justified. However, the Department has been unable to identify any such competitive defect, and none has been brought to our attention. Indeed, the available evidence on the nature and causes of the problems confronting jobbers and dealers suggests that no such defect exists."[12]

In testimony before the House of Representatives on similar divorcement/open supply legislation, the Department of Energy stated "predatory conduct by a refiner against one segment of its marketing system would be self-defeating * * * We would not expect a rational company to lose money through one distribution arm in the hope it will build up its other arm to compensate for the loss. Moreover, other marketers stand ready to enter the industry. . . . Since gasoline marketing is one of the easiest industries to enter, entry, in fact, takes place to such an extent that

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[11] Testimony presented by Ronald B. Rowe, Assistant Director, Bureau of Competition, Federal Trade Commission, before the Committee on the Judiciary of the United States Senate on S. 1140, October 9, 1985, pgs. 2-3.

[12] Statement of Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, before the Committee on the Judiciary, United States Senate on S. 1140, October 9, 1985, pgs. 3-4.

major refiners continue to lose market share to independent marketers."[13]

Is unnecessary

S. 1140 is unnecessary because current laws provide adequate remedies for anticompetitive behavior in the retail motor fuel market, and the number of company-operated stations by major refiners remains small. The American Bar Association states that "federal antitrust laws have several advantages over divorcement legislation," most notably, "antitrust laws are narrowly focused on anticompetitive conduct rather than a broad restructuring of the market."[14] Antitrust laws include Sections 1 and 2 of the Sherman Act, which prohibits conspiracy and attempts to monopolize; the Robinson-Patman Act, which prohibits price discrimination between buyers; Section 3 of the Clayton Act, which prohibits certain exclusive dealing arrangements; and Section 5 of the Federal Trade Commission Act which prevents any unfair method of competition.

Branded lessee dealers are also protected from arbitrary termination or non-renewal of their lease agreement by the 1978 Petroleum Marketing Practices Act (PMPA). PMPA makes it unlawful to terminate or fail to renew a dealer's contract on the ground that the supplier wishes to replace the dealer with a company-operated station.

Proponents of divorcement legislation also allege refiners force dealers out of the marketplace to replace them with high-volume company operations. However, according to the Lundbert Letter, a weekly oil marketing newsletter, only 4 percent of major brand stations are company-operated.[15] This demonstrates large, refiner company-operated stations remain a small proportion of total retail outlets, and independent retail operations are the dominant form of retail gasoline marketing for large refiners. Additionally, the Department of Energy concludes, "In general, lessee dealers tend to be stronger where a refiner's company operations are strong.[16]

Reduces competition and promotes inefficiencies

Proponents of S. 1140 feel divorcement would make dealers more competitive and benefit consumers. But it should be noted divorcement actually eliminates an entire class of competitors from the retail market. The American Bar Association finds divorcement legislation would substantially restructure the retail petroleum industry, and lead to market place inefficiencies.[17] It lessens the number of competitors and protects the position of one class of marketers. This results in fewer consumer choices, reduced con-

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[13] Statement of Leonard L. Coburn, Director, Division of Competition, Office of Communications, Office of Congressional, Intergovernmental and Public Affairs, U.S. Department of Energy, on H.R. 3824, April 17, 1986, before the Committee on Small Business, Subcommittee on General Oversight and the Economy, U.S. House of Representatives, pgs. 4-5.

[14] American Bar Association, Section of Antitrust Law, Report to the House of Delegates, recommendation to oppose S. 1140, 1986, pg. 4.

[15] *Lundberg Letter*, "How Gasoline Station Operations are Changing," April 11, 1986, Vol. XIII, Number 24, pg. 8.

[16] *Deregulated Gasoline Marketing, Consequences for Competition, Competitors and Consumers*, Draft Report, U.S. Department of Energy, March 1984, pg. ii. (Referenced in testimony presented to the Senate Committee on the Judiciary on S. 1140, October 9, 1985.)

[17] American Bar Association, Section of Antitrust Law, Report to the House of Delegates, recommendation to oppose S. 1140, 1986, pg. 1.

sumer convenience and reduced competition. Consumers are best served by markets in which the greatest number of suppliers are allowed to compete for their business.

According to research by Robert N. Fenili and William C. Lane, Jr., "Decontrol has allowed the market to become more efficient. In refining, a major source of improved efficiency has been the closing of 104 refineries. Further downstream, the source of improved efficiency can be traced to changes in the marketing strategies of major refiners. These companies have revamped their marketing efforts to be more in tune with today's gasoline market. Primarily, this means reorienting their marketing strategy to penetrate more fully the price-conscious segment of the gasoline market, a segment that has increased in proportion to total gasoline sales. The end result of this marketing shift has been to intensify price competition in gasoline marketing." [18]

Increases government intervention

S. 1140 would create new government regulation in the marketing of petroleum products. Past efforts by the federal government to regulate the gasoline marketplace have been contrary to the public interest.

Divorcement legislation would set a dangerous precedent for government interference in the property rights of businesses. The refiner operation of some service stations, as part of an overall distribution system, is not an unusual business practice, and various industries have long employed this method of distribution. The practice of marketing through both directly owned outlets and retailers (dual distribution) has been used for many years in a variety of industries, including clothing, drugs, glass, milk, shoes, feed, paint, photographic supplies, pianos, computers, restaurants, fast food shops, beauty salons, hotels, repair shops, and tire shops. Because so many different types of businesses employ this kind of marketing approach, legislation aimed at one kind of business could affect others. Legislation that is intended to apply to only one business can be couched in language making it applicable to any business that employs dual distribution. Consequently, if divorcement legislation is successfully applied to gasoline retailing, proposals to restrict similar marketing practices in other businesses would likely follow.

GRANDFATHER PROVISION

Section 4(b) allows large integrated refiners to continue operation of any motor fuel service station in operation on the date of S. 1140's enactment. This provision does not make S. 1140 acceptable. Divorcement itself is without merit, and divorcement with a grandfather provision is equally objectionable. There are two reasons: (1) divorcement occurs anyway, it just takes a little longer via obsolescence and attrition, and (2) it prohibits large refiners from responding to consumer demands vis-a-vis directly-operated stations, while permitting other competitors to freely respond. In effect, passage of

[18] *Gasoline Marketing at the Crossroads: Competition or Regulation*, Robert N. Fenili and William C. Lane, Jr., April 19, 1985, pg. ii.

S. 1140 would create a strong competitive advantage for small refiners, wholesalers and chain marketers who may continue to operate and open new company-operated stations.

The "grandfather" provision is also objectionable because it was adopted as an amendment of S. 1140 without proper review by the Judiciary Committee. No testimony or statements for the record have been received from affected industry groups, public interest organizations, Administration officials, or other interested parties. A careful review and evaluation of all marketplace effects of Section 4(b), the "grandfather" provision, is essential.

SUMMARY

Proponents of S. 1140 have not documented a need for this legislation—either the branded supply restrictions in Section 2 or the divorcement provision in Section 3. S. 1140 is anti-consumer, anti-competitive, discriminatory legislation and is an unnecessary intervention in the marketplace.

The free market, rather than regulation, should be relied upon to allocate resources in the most efficient manner. Consumers, and not the government, should determine which marketers remain viable in today's highly competitive gasoline market.

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